LIM ENG HENG

v.

LIM SAM KEOW & ORS

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[SUIT NO: 22-370-2000]
20 FEBRUARY 2003

CONTRACT: *Brokerage contract - Commission - Sale and purchase of land - Whether plaintiff a registered estate agent - Whether plaintiff had given defendant unlawful consideration - Whether contract void and unenforceable - Contracts Act 1950, s. 24(a), (b) - Valuers, Appraisers and Estate Agents Act 1981, ss. 2, 22B(1), 22C(1)(ba), (c), 30*

CIVIL PROCEDURE: *Striking out - Claim by plaintiff for commission of a brokerage contract - Whether claim frivolous and vexatious - Whether an abuse of process of court*

This was an appeal by the defendants against the decision of the learned deputy registrar dismissing the defendants' application (encl. 28) to strike out the plaintiff's statement of claim and reply to the defendants' statement of defence and counterclaim with costs. The plaintiff's claim against the defendants was for a sum of RM1,425,336.66 together with interest thereon and costs of the action being the balance of charges for services rendered by the plaintiff to the defendants in procuring a purchaser for the defendants in respect of certain properties ('the said land') belonging to the defendants. The defendants had made a payment of RM475,112.22, which represented 1% of the purchase price of the said land, but despite several reminders, had failed to pay the balance to the plaintiff.

The defendants contended in their statement of defence that the plaintiff's claim should be struck out as it was frivolous, vexatious and an abuse of the process of the court, and that it was prohibited by the provisions of the Valuers, Appraisers and Estate Agents Act 1981 ('the said Act') as the plaintiff was not a registered estate agent. The defendants further counterclaimed for a refund of the sum of RM475,112.22 averring that the plaintiff was not entitled to keep the monies as it was paid without consideration or alternatively, that the plaintiff received the monies in breach of the provisions of the said Act. The plaintiff, in his reply to the defendants' statement of defence and counterclaim, denied all the defendants' contentions, and re-asserted that he was entitled to the balance.

Held:

[1] Even if the plaintiff had succeeded in proving that there existed an agreement between the plaintiff and the defendants, the agreement was void and unenforceable under s. 24 of the Contracts Act 1950 as it clearly contravened s. 22C of the said Act. The consideration which the plaintiff had agreed to give to the defendant, to wit, the procuring of a purchaser for the said land belonging to the defendants was unlawful consideration pursuant to s. 24(a) and (b) of the Contracts Act 1950, as s. 22C(1)(ba) of the said Act prohibited any person from offering for sale or inviting offers to purchase any land, building, etc., unless he was a registered estate agent. It was an undisputed fact in the present case that the plaintiff was not a registered agent which meant the plaintiff's undertaking of any estate agency practice was also prohibited by s. 22C(1)(c) read together with ss. 2 and 22B(1) of the said Act. (pp 12 h, 13 a & 15 b-e)

[2] The plaintiff's arguments that these prohibitions did not apply to him because he was not even an estate agent but merely an agent to the defendants and that the transaction was only a "one-off" transaction, were devoid of any merits for even a single act for a "commission fee, reward or other consideration" as an agent in respect of the sale or other disposal of land or buildings was caught by the prohibition in the said Act, and was also an offence under s. 30 of the said Act. (pp 15 h & 16 a)

[3] The plaintiff's claim was frivolous and vexatious because it was obviously unsustainable by reason of illegality. It was also an abuse of the process of the court as the plaintiff was seeking recourse to the court in order to enforce a void agreement in which his consideration was unlawful, and for which he could be prosecuted for an offence under s. 30 of the Act. Therefore, the defendants appeal was allowed. However, the defendants' counterclaim that the monies were paid to the plaintiff without consideration or alternatively, that the plaintiff had received the monies in breach of the provisions of the said Act was clearly devoid of any merits and an abuse of the process of the court, and was therefore dismissed.
(pp 9 h, 10 b, 16 h & 17 b)

[Ordered accordingly.]

Case(s) referred to:
Appadurai Ponnusamy v. Pentadbir Harta Pesaka Appalasamy Nookiah, deceased & Anor [1998] MLJU 538 HC ***(foll)***
Ashmore v. British Coal Corp [1990] 2 QB 338 ***(refd)***
Att-Gen of Duchy of Lancaster v. L & NW Ry [1892] 3 Ch 274 ***(refd)***
Castro v. Murray [1875] 10 Ex 213 ***(refd)***

Dawkins v. Prince Edward of Saxe Weimar, Willis v Earl Beauchamp [1886] 11 P59 ***(refd)***
ET, Mailers Ltd v. Robertson [1974] ICR 72 ***(refd)***
Holwell Securities Ltd v. Hughes [1973] 2 All ER 476 ***(refd)***
Howard Houlder & Partners Ltd v. Manx Islec Steamship Co Ltd [1923] 1 KB 110 ***(refd)***
Norman v. Matthews [1916] 85 LJKB 857 ***(refd)***
Ong Kee Ming v. Quek Yong Kang & Anor [1991] 3 MLJ 294 HC ***(dist)***
Vinson v. Prior Fibres Consolidated Ltd [1906] WN 209 ***(refd)***
Willis v. Earl Howe [1893] 2 Ch 545 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2, 24(a), (b), 22B(1), C(1)(ba), (c), 30
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)
Valuers, Appraisers and Estate Agents Act 1981, ss. 2, 22B(1)(ba), 22C(1)(a), (aa), (ba), (c), (d), 30

Other source(s) referred to:
The Supreme Court Practice, 1999, vol 1, para 18/19/18, p 352

For the plaintiff - Saranjit Singh; M/s Adliza Subra & Partners
For the defendants - YC Wong; M/s Lim Kean Siew & Co

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:
This is an appeal to the judge-in-chambers (encl. 71) against the decision of the learned deputy registrar dated 11 October 2001 dismissing the defendants' application (encl. 28) to strike out the plaintiff's statement of claim and defence to counter-claim with costs.

Facts and background
The plaintiff's claim against the defendants is for a sum of RM1,425,336.66 together with interest thereon and costs of the action being the balance of charges for services rendered by the plaintiff to the defendants in procuring a purchaser for the defendants in respect of certain properties belonging to the defendants.

The defendants are the beneficial owners of four pieces of land, namely, Lots No. 440, 441, 803 and 2450, Seksyen 4, Bandar Butterworth, Province Wellesley North held under Grant First Grade No. 30871, 30872, 33267 and 55448 (hereinafter referred to as "the said lands").

On 10 December 1999, the plaintiff filed a writ of summons and statement of claim (encl. 2) against the defendants.

Plaintiff's Statement Of Claim

In his statement of claim, the plaintiff avers that on 10 July 1996 the defendants gave to the plaintiff and one Ang Chin Huat (hereinafter referred to as "the said Ang Chin Huat") an option (hereinafter referred to as "the said option") to procure a buyer for the said lands from either MCB Group of Companies, or OSK Group of Companies or PJD Group of Companies (hereinafter referred to as "the said companies").

In para. 3 of the plaintiff's statement of claim, the plaintiff avers that on the same date, the defendants issued a letter of confirmation confirming that a service charge of 4% of the purchase price for the said lands (exclusive of tax) will be paid to the plaintiff and a further 1% of the purchase price (exclusive of tax) will be paid to the said Ang Chin Huat if the two of them being the option holders succeeded in procuring a buyer from the said companies (hereinafter referred to as "the said letter of confirmation").

According to the plaintiff, through the plaintiff's efforts, the said lands were sold to one of the said companies, namely, MCB Eastern Land Sdn Bhd (hereinafter referred to as "the purchaser").

The sale and purchase agreement in respect of the said lands was executed by the defendants as vendors and MCB Eastern Land Sdn. Bhd. as purchaser on 14 October 1996. It was stamped on 7 November 1997. The purchase price of the said lands is RM47,511,222.

In para. 7 of the plaintiff's statement of claim, the plaintiff also avers that pursuant to the said letter of confirmation dated 10 July 1996, the plaintiff is entitled to be paid a sum of RM1,900,448.88 being 4% of the purchase price of RM47,511,222 being his service charges in respect of the sale of the said lands.

On 26 January 1998, the defendants issued to the plaintiff, two cheques for the total sum of RM100,000 and on 8 April 1998, another cheque for a sum of RM375,112.22 making it a total of RM475,112.22 which represents 1% of the purchase price of the said lands. This leaves a balance of RM1,425,336.66 or 3% of the purchase price being the balance of the service charges (hereinafter referred to as "the said balance") still to be paid.

Despite several reminders, including a letter of demand dated 11 November 1998 which was sent to the defendants by the plaintiff's solicitors, the defendants have failed and neglected to pay the said balance to the plaintiff.

Defendants' Statement Of Defence

In the defendant's statement of defence the defendant contends that the plaintiff's claim should be struck out or dismissed with costs on the following grounds:

(1) the plaintiff's claim is frivolous, vexatious and an abuse of the process of the court;

(2) the plaintiff's claim is prohibited by the provisions of the Valuers, Appraisers and Estate Agents Act 1981 (hereinafter referred to as "the said Act") as the plaintiff is not a registered estate agent;

(3) the plaintiff's claim is invalid because:

(a) the service charges are actually brokerage commission which is only payable by the defendants to the plaintiff and the said Ang Chin Huat if the plaintiff or his nominee had exercised the said option in accordance with the terms of the said option;

(b) the plaintiff did not exercise the said option within the time frame provided for in cl. 1 of the said option which expressly provides that the said option is only valid if it is exercised on or before 16 July 1996 after which it is null and void;

(c) the plaintiff or his nominee did not exercise the said option in writing and did not deliver the acceptance copy annexed to the said option to the defendant's named advocates and solicitors at their named address together with the sum of RM12,953,024 being the deposit and being 20% of the purchase price of RM64,765,120 pursuant to the express provisions of cl. 2 of the said option;

(d) contrary to cl. 4 of the said option which expressly provides that the purchase price shall be calculated at RM70 per square feet without vacant possession which amounts to RM64,765,120 or RM80 per square feet with vacant possession which amounts to RM74,017,280 the said lands were sold at a price of RM47,511,222 only;

(e) contrary to cl. 5 of the said option which expressly requires the purchaser to enter into a sale and purchase agreement with the defendants as vendor within 14 days from the exercise of the said option the sale and purchase agreement for the said lands was only executed on 14 October 1996 which date is outside the 14 day period allowed;

(f) the deposit of RM12,953.024 as provided for in cl. 2 of the said option was never paid to the defendants;

(g) clause 9 of the said option expressly makes time the essence of the said option; and

(h) at the time of the execution of the Sale and Purchase agreement on 14 October 1996 the said option and the said letter of confirmation relied upon by the plaintiff had long since lapsed and were no longer valid.

(4) alternatively, the plaintiff's claim is invalid because the said option and said letter of confirmation are in breach of the provisions of the said Act as the plaintiff was not a registered estate agent at the material time;

(5) the plaintiff is well aware that the sum of RM475,112.22 comprised in three cheques which were issued by the defendants to the plaintiff being 1% of the purchase price is merely an ex-gratia payment of commission to the plaintiff as the plaintiff had introduced the said purchaser to the defendants on an oral undertaking by the plaintiff that he would not make any further claims in respect of service charges (hereinafter referred to as "the said oral undertaking");

(6) the 3rd cheque being the "final portion of the (plaintiff's) commission" was issued in the name of one Ho Ewe Jit pursuant to the plaintiff's instructions as confirmed in writing by the plaintiff dated 8 April 1998 (hereinafter referred to as "the said confirmation in writing") and the said oral undertaking;

(7) by virtue of the said oral undertaking, the plaintiff is estopped from making any claim against the defendants for service charges; and

(8) the defendants had conveyed to the plaintiff the defences as set out above in a letter dated 15 December 1998 by the defendants' solicitors;

Defendants' Counter-Claim

In the defendants' counter-claim, the defendants are claiming for a refund of the sum of RM475,112.22 being *ex gratia* commission together with interest thereon and costs. The defendants contend that the plaintiff is not legally entitled to keep the money. The defendants rely on the following grounds:

(1) it was paid without consideration;

(2) alternatively, the plaintiff has received the monies in breach of the provisions of the said Act.

Plaintiff's Reply To Defendants' Defence And Counter-Claim

On 25 April 2000, the plaintiff filed his reply to the defendants' statement of defence and counter-claim (encl. 16).

The plaintiff denied all the defendants' contentions, in particular, the defendants' contentions that the sum of RM475,112.22 was an *ex gratia* payment for commission and that he had given the said oral undertaking to the defendants. The plaintiff re-asserts that he is entitled to 4% of the purchase price being his service charges of which 1% has been paid and the balance of the 3% is still due and payable.

The plaintiff also asserts that the plaintiff has complied with all the terms of the said option and that the plaintiff had introduced the said purchaser to the defendants before the expiry of the date of the said option.

In conclusion, the plaintiff prayed that his claim be allowed with costs and the defendant's counter-claim be dismissed with costs.

Defendants' Application To Strike Out The Plaintiff's Statement Of Claim And Reply To The Defendants' Defence And Counter-Claim

On 30 May 2000, the defendants applied *vide* summons-in-chambers (encl. 28) to strike out with costs the plaintiff's statement of claim and reply to the defendants' statement of defence and counter-claim (hereinafter referred to as "the said pleadings") and to enter judgment in respect of the defendants' counter-claim pursuant to O. 18 r. 19(1), (b) or (d) of the Rules of the High Court 1980 (hereinafter referred to as "the RHC").

The defendants relied on the following grounds:

(1) the plaintiff's statement of claim being devoid of merits and prohibited by the provisions of the said Act is frivolous, vexatious and an abuse of the process of the court; and

(2) the plaintiff's reply to the defendants' defence and counter-claim consisting only of bare allegations and denials are devoid of merits and is frivolous, vexatious and an abuse of the process of the court.

In the defendants' supporting affidavit affirmed on 24 May 2000 by the 1st defendant and filed on 30 May 2000 (encl. 29), the defendants have adopted the contents of their statement of defence and counter-claim. The defendants have also exhibited a copy of the said option (exh. "A"), the said letter of confirmation (exh. "B"), the said confirmation in writing dated 8 April 1998 (exh. "C") and a letter dated 15 December 1998 from the defendants' solicitors

(exh. "D") to support their contentions in their statement of defence. In my judgment, exh. "D" is clearly inadmissible in these proceedings since it is a "without prejudice" communication.

The defendants have further reiterated that the plaintiff's claim is expressly prohibited by the said Act as he is not a registered estate agent and that the plaintiff's reply to the defendant's defence and counter-claim contains bare allegations and denials.

On 31 January 2001, upon obtaining prior leave of the court the plaintiff filed his affidavit-in-reply affirmed on 13 January 2001 (encl. 53).

According to the plaintiff, he has a good cause of action against the defendants. Although the plaintiff admits the said letter of confirmation (exh. "B") and the said confirmation in writing (exh. "C") he categorically denies the existence of the said option (exh. "A") and requires the defendants to prove the existence of exh. "A". The plaintiff also explains that the said confirmation in writing refers only to a part of the whole transaction between the plaintiff and defendants. The plaintiff seeks to explain that the contents of the said confirmation in writing actually referred to the payment of a portion of his 1% service charge to the said Ho Ewe Jit and that he did not understand the contents of the said confirmation in writing which was prepared by the 1st defendant upon the plaintiff's instructions when the plaintiff signed it.

According to the plaintiff he only discovered this when he went home and his son, Lim Siew Kee, read exh. "C" and told the plaintiff that exh. "C" is confusing and could mean something else. The plaintiff immediately telephoned the 1st defendant that the latter had distorted the actual position. The 1st defendant told the plaintiff that if the plaintiff was dissatisfied with exh. "C" the first plaintiff can exchange it for a fresh one which will be prepared by the 1st defendant. The plaintiff returned exh. "C" and the 1st defendant's wife prepared a fresh confirmation in writing (exh. "LEH-4") but the plaintiff did not agree to it and the plaintiff refused to sign exh. "LEH-4" or take back exh. "C".

The plaintiff insists that the "final portion" referred to in exh. "C" refers to a sum of RM375,112.22 being the final portion of his 1% service charge amounting to RM475,112.22 which is calculated as follows:

RM475,112.22 – RM100,000.00 = RM375,112.22.

In para. 12(a), the plaintiff states that although he is not a registered estate agent he is, nevertheless, entitled to be paid the service charges of 4% of the purchase price being his remuneration because he has performed his obligations,

the defendants were aware at all material times that he was not a registered estate agent, that in August 1996 he had introduced the said purchaser to the 1st defendant and the said lands were subsequently sold to the said purchaser.

On 20 April 2001, the defendants filed their affidavit-in-reply affirmed by the 1st defendant on 19 April 2001 (encl. 62). The 1st defendant disagreed with the plaintiff's version of the events surrounding exh. "A", exh. "C" and exh. "LEH-4" as given by the plaintiff in his affidavit-in-reply. The defendants, nevertheless, admitted that they agreed to pay the plaintiff the 1% commission for the plaintiff's services as an estate agent on an *ex gratia* basis as the said purchaser was introduced by the plaintiff and the plaintiff had agreed with the amount of 1% and had signed exh. "C".

On 10 May 2001, the plaintiff filed his affidavit-in-reply affirmed by himself on 3 May 2001 (encl. 64).

The plaintiff disagreed with the defendants' version of events surrounding exhs. "A", "C" and "LEH-C" and reasserts that his version is correct. The plaintiff further states that he has instructed his solicitors to apply to the court to amend his statement of claim to reflect the true position.

Decision Of The Deputy Registrar

On 11 October 2001, the learned deputy registrar dismissed the defendants application with costs on the ground that the plaintiff's claim is not one which is "obviously unsustainable" and that there are factual issues which necessitated the evidence of witnesses in a full trial. The learned deputy registrar did not identify the factual issues.

On 18 October 2001, the defendants filed their notice of appeal to the judge in chambers (encl. 71) against the decision of the learned deputy registrar.

Decision Of The Court

The court heard lengthy submissions on 5 August 2002 and 8 October 2002. On 8 October 2002, after considering the contents of the affidavits filed by both the parties, the pleadings, the lengthy oral submissions, the written submissions and the authorities cited by both the learned counsels, the court allowed the defendant's appeal (encl. 71) with costs and ordered that the said pleadings be struck out.

However, the court did not give judgment to the defendants on the defendants' counter-claim. The reasons are first, the defendants have in their statement of defence admitted that the sum of RM475,112.22 claimed is an *ex gratia* payment to the plaintiff by the defendants. Secondly, the defendants have also

admitted in para. 11 of their statement of defence and also in their affidavit-in-reply (encl. 62) that it was the plaintiff's efforts in introducing the said purchaser to the defendants which have enabled the defendants to sell the said lands to the said purchaser, *albeit*, after the said option has expired and at a price much lower than the two prices stated in the said option. Therefore, the defendants' counter-claim that the monies were paid to the plaintiff without consideration or alternatively, that the plaintiff has received the monies in breach of the provisions of the said Act is clearly devoid of any merits and should be dismissed on the ground that it is an abuse of the process of the court.

Issues For The Court's Determination

Before arriving at its decision to strike out the said pleadings, the court considered the following two issues:

(1) whether the plaintiff's statement of claim and reply to the defendants' defence and counter claim is frivolous or vexatious; and

(2) whether the plaintiff's statement of claim and reply to the defendants' defence and counter-claim is an abuse of the process of the court.

The Submissions Of The Defendants' Counsel

Mr YC Wong, learned counsel for the defendants, submitted that if the court is satisfied with any of the three grounds relied upon by the defendants, to wit, illegality, total failure on the plaintiff's part to comply with the terms of the said option and letter of confirmation and waiver/estoppel, accord and satisfaction, then the court should strike out the said pleadings. The reason is because any one of the three grounds standing by itself is sufficient to achieve the purpose of the defendants' application in encl. (28).

He also submitted that by virtue of the plaintiff's own admission in his statement of claim that he is not a registered estate agent, the plaintiff's claim being a claim for fees for services rendered as an estate agent is obviously unsustainable and is also an abuse of the process of the court because of the prohibition contained in the clear provisions of s. 22C(1) of the said Act, in particular, paras. (a), (aa), (ba), (c) and (d).

He cited the case of *Appadurai Ponnusamy v. Pentadbir Harta Pesaka Appalasamy Nookiah, deceased & Anor* [1998] MLJU 538 in support of his submissions. He also submitted that the plaintiff's claim is doomed to failure because he has not complied with the terms of the said option. He relied on the case of *Holwell Securities Ltd v. Hughes* [1973] 2 All ER 476 and *Howard Houlder & Partners Ltd v. Manx Islec Steamship Co Ltd* [1923] 1 KB 110.

He further submitted that the plaintiff's acceptance of the three cheques for a total sum of RM475,112.22 and the signing by the plaintiff of the said confirmation in writing amounts to a waiver of the plaintiff's remaining claim, if any, the plaintiff is estopped from filing the writ of summons and statement of claim and the plaintiff's claim has been extinguished by accord and satisfaction.

The Submissions Of The Plaintiff's Counsel

Mr Saranjit Singh, the learned counsel for the plaintiff, has submitted, *inter alia*, that the said Act is inapplicable to the plaintiff because he is not a registered estate agent under the Act.

He also submitted that since the transaction is a one-off transaction and the plaintiff has not held himself out to the public or advertised his services or issued name cards proclaiming himself an estate agent, the plaintiff cannot be said to be undertaking the business of an estate agent as defined in the said Act and the plaintiff is, therefore, entitled to the sum claimed as an allowance or payment for services rendered.

He further submitted that since the defendants have already paid the 1% commission to the plaintiff, they are estopped from relying on this defence. He cites the case of *Ong Kee Ming (t/a FL Development and Property Consultants) v. Quek Yong Kang & Anor* [1991] 3 MLJ 294 in support of his submissions.

The Law Applicable

Order 18 r. 19 of the RHC provides as follows:

> (1) **The court may at any stage of the proceedings order to be struck out** or amended **any pleading** or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, **on the ground that**:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) **it is** scandalous, **frivolous or vexatious**; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) **it is otherwise an abuse of the process of the court**;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (3) No evidence shall be admissible on an application under paragraph (1)(a).

(4) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading. (Emphasis added.)

In these proceedings the defendants have invoked only r. 19(1)(b) and (d) of O. 18.

Lindley LJ in an old English case, *Att-Gen of Duchy of Lancaster v. L & NW Ry* [1892] 3 Ch 274 at 277 held that by these words "frivolous and vexatious" are meant cases which are obviously frivolous or vexatious or obviously unsustainable.

The expression "frivolous or vexatious" also includes proceedings which are an abuse of the process (see *ET, Mailers Ltd v. Robertson* [1974] ICR 72, cited with approval in *Ashmore v. British Coal Corp* [1990] 2 QB 338; [1990] 2 All ER 981, CA).

The term "an abuse of the process of the court" connotes the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery, and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. (See *Castro v. Murray* [1875] 10 Ex 213: *Dawkins v. Prince Edward of Saxe Weimar, Willis v Earl Beauchamp* [1886] 11 P59, per Bowen LJ at 63).

Order 18 r. 19(1)(d) confers on the court in express terms powers which the court has previously been exercising under its inherent jurisdiction where there appeared to be "an abuse of the process of the court." In an application under O. 18 r. 19(1)(d) the applicant can go into all the facts and affidavits as to the facts are admissible. (See *Willis v. Earl Howe* [1893] 2 Ch 545 at 551 and 554; *Vinson v. Prior Fibres Consolidated Ltd* [1906] WN 209; *Norman v. Matthews* [1916] 85 LJKB 857).

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interest of justice may be very material. (See *The Supreme Court Practice*, 1999, Volume 1, para 18/19/18, p. 352).

Findings Of The Court

In my judgment, even if the plaintiff succeeds in proving that there exists an agreement between the plaintiff and the defendants as averred by the plaintiff in the said pleadings and the plaintiff's affidavits filed in these proceedings, the agreement is void and unenforceable under s. 24 of the Contracts Act 1950

as it clearly contravenes s. 22C of the said Act. The reason is because such an agreement is actually a contract between the plaintiff and defendants whereby the defendants would pay the plaintiff 4% of the purchase price as commission in consideration of the plaintiff undertaking estate agency practice in inviting offers from the said companies to purchase the said lands. On this ground alone, the court is justified in striking out the said pleadings.

Section 24 of the Contracts Act 1950 provides as follows:

> What considerations and objects are lawful, and what not.
>
> The consideration and object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> ILLUSTRATIONS
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) ...
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> (g) ...
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> (h) ...
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> (i) A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) ...

(k) ...

Section 22C(1) of the said Act provides as follows:

Restrictions on estate agency practice

(1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16:

(a) ...

(aa) ...

(b) ...

(ba) offer for sale or invite offers to purchase any land, building and any interest therein irrespective of whether such land, building and interest is located within Malaysia or outside Malaysia: Provided that where foreign properties are to be marketed in Malaysia, such offer or invitation shall be made by or through an estate agent practising and residing outside Malaysia;

(c) undertake any of the work specified in section 22B; or

(d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

Section 22B of the said Act provides as follows:

Estate agency practice

(1) Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice.

(1A) ...

(2) ...

(a) ...

(b) ...

The term "estate agency practice" used in s. 22B(1) is defined as follows in s. 2 of the said Act:

"estate agency practice" means acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration, as an agent

in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest or in respect of the leasing or letting of land and buildings and of any interest therein;

In my judgment, the consideration which the plaintiff has agreed to give to the defendants which he has in fact given by virtue of the defendants' own admission, to wit, the procuring of a purchaser from the said group of companies to purchase the said lands belonging to the defendants is an unlawful consideration pursuant to s. 24(a) and (b) of the Contracts Act 1950 as it is forbidden by the said Act and it is also of such a nature that, if permitted, it would defeat the said Act.

The reason is because s. 22C(1)(ba) of the said Act prohibits in very clear terms any person from offering for sale or inviting offers to purchase any land, building, etc., irrespective of whether such land, building, etc., is located within Malaysia or outside Malaysia unless he is a registered estate agent.

It is an undisputed fact in the present case that the plaintiff is not a registered estate agent.

The undertaking of any estate agency practice by a person who is not a registered estate agent such as the plaintiff in the present case is also prohibited by s. 22C(1)(c) of the said Act read together with s. 22B(1) and s. 2 of the said Act. This is because the plaintiff by acting as agent for what he calls a "fee" and what his learned counsel calls a "remuneration" but which the defendants and their learned counsel call a "commission" in respect of the sale of the said lands to a company from the said group of companies has undertaken "work specified in s. 22B" within the prohibition of s. 22C(1)(c) of the said Act, namely, "estate agency practice" mentioned in s. 22(B)(1) of the said Act which expression is defined in s. 2 of the said Act and reproduced above.

Section 22B(1) makes it clear that only a registered estate agent is authorised to undertake "estate agency practice".

However, the plaintiff seeks to argue that these prohibitions do not apply to him because he is not even an estate agent but merely an agent to the defendants and, therefore, he is not caught by the prohibitions contained in s. 22C and 22B of the said Act. Further, he argues that the transaction is only a "one-off" transaction and that he is in fact gainfully employed as a director of various companies.

In my judgement his arguments do not hold water and are devoid of any merits because even a single acting for a "commission fee, reward or other consideration" as an agent in respect of the sale or other disposal of land and/or buildings is caught by the prohibition in the said Act. Such a single acting is also an offence under s. 30 of the said Act.

Section 30 of the said Act provides as follows:

> PART VIII
>
> GENERAL
>
> Offences
>
> Any person who:
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> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
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> (e) ...
>
> (f) ...
>
> (g) ...
>
> (h) not being a person acting under the immediate personal direction and supervision of a registered valuer, appraiser or estate agent carries out or undertakes to carry out any provided under section 19 or 22B; or
>
> (i) acts in contravention of section 22C,
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> commits an offence and is liable on conviction to a fine not exceeding twenty-five thousand ringgit or to imprisonment for a term not exceeding three years or to both and he shall be liable to a further penalty of five hundred ringgit for each day during the continuance of such offence.

In my judgment, the plaintiff's claim is frivolous and vexatious because it is obviously unsustainable by reason of illegality. It is also an abuse of the process of the court because the plaintiff is seeking recourse to the courts in order to enforce a void agreement in which his consideration is unlawful for which he can be prosecuted for an offence under s. 30 of the said Act. Surely the court cannot lend its hand to help the plaintiff to recover the said balance from the defendants. The court should instead strike out the said pleadings. In my judgment, the *Ong Kee Ming* case is distinguishable because the defence of illegality was never raised.

In my judgment, the decision of Mohd Hishamudin bin Hj Mohd Yunus, J in the *Appadurai* case is applicable to the facts of this case.

In the premises, as the court is satisfied that the said pleadings disclose manifest illegality which renders the said pleadings frivolous and vexatious and also an abuse of the process of the court, the court allowed the defendants appeal to strike out the plaintiff's statement of claim and reply to the defendants' defence and counter-claim with costs.